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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

January 27, 2014

2:07 PM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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(CC: Doc. No. 6139) Adjourned Hearing Re: Debtors' Motion

Pursuant to Sections 105(a) and 554(a) of the Bankruptcy Code  
for an Order Approving Abandonment of Debtors' Interests in  
Certain Assets. Filed by Lorenzo Marinuzzi on Behalf of  
Residential Capital, LLC

(Doc No. 5786) Adjourned Hearing Re: Debtors' Objection to  
Claim No. 5420 of Vachagan Abed-Stephen and Suzie Abed-Stephen

(CC: Doc. No. 5150, 5909) Adjourned Hearing Re: Motion for  
Omnibus Objection to Claim(s)/Debtors' Forty-Second Omnibus  
Objection to Claims (Reduce and Allow Borrower Claims). Going  
Forward as to Claims of Jennifer and Jason Schermerhorn

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. We're here in  
3 Residential Capital, number 12-12020.

4 Mr. Marinuzzi?

5 MR. MARINUZZI: Good afternoon, Your Honor. Lorenzo  
6 Marinuzzi, Morrison & Foerster, on behalf of the ResCap  
7 reorganized debtors.

8 Your Honor, we're going to begin this afternoon on  
9 page 2 of the agenda under item 1, uncontested matters. And  
10 that's the debtors' motion pursuant to Sections 105(a) and  
11 554(a) for an order approving abandonment of the debtors'  
12 interests in certain estate assets.

13 The abandonment motion, Your Honor, seeks approval of  
14 the abandonment as of the filing date for the motion, which is  
15 December 17th, 2013, of certain categories of assets that are  
16 under the definition of excluded assets under the plan, not  
17 transferred to the liquidating trust.

18 And there are basically five categories.

19 The first is what we call the NERDS, which are the  
20 noneconomic residuals and REMIC securitizations. I didn't make  
21 up the term, Your Honor. The trust certificates and nonREMIC  
22 securitizations. Equity in a passive foreign investment  
23 company. The debtors' interests in what we refer to as the  
24 "common land." And 10,200 approximately home equity lines of  
25 credit, or HELOC loans.

1 Since the motion was filed in mid-December we fielded  
2 some telephone calls from the Department of Justice, from  
3 Ocwen, from some borrowers, from representatives of the New  
4 Jersey Carpenters class action. And if I didn't -- and the  
5 RMBS trustees, importantly, Your Honor.

6 And we've had some discussions with them, provided  
7 them with some additional details and explanations. And I'm  
8 happy to report that none of those parties has filed an  
9 objection. So the motion is uncontested.

10 In support of the motion we offer the declaration of  
11 William Tyson, who is the debtors' -- or was the debtors' chief  
12 asset disposition officer, now employed by the liquidating  
13 trust. He's here in court with us, Your Honor, today, should  
14 Your Honor have any questions of him. And I'd like to move  
15 that declaration into evidence, if I might.

16 THE COURT: All right. Any objections?

17 All right, the declaration is admitted in evidence.  
18 (Declaration of William Tyson was hereby received into  
19 evidence, as of this date.)

20 MR. MARINUZZI: Thank you, Your Honor. So let me just  
21 provide the Court with an overview of what these asset  
22 categories are.

23 So we have the NERDS, and those are set forth in  
24 Exhibit 2-A to the motion.

25 THE COURT: I was fascinated by the NERDS.

1 MR. MARINUZZI: They are fascinating, Your Honor,  
2 fascinating.

3 These are noneconomic residual interests in REMICs,  
4 which are real estate mortgage investment conduits. They're a  
5 tax flow-through vehicle widely used in mortgage-backed  
6 securities. They typically have no or minimal cash flow.  
7 They're viewed -- while they're "an asset" they're viewed more  
8 as a liability. And we tried to market these and tried to  
9 sell them. But our experience in this, and we've done this in  
10 a prior case, as well, Delta Financial, is you actually have to  
11 pay somebody to take them from you, because they have to absorb  
12 some losses over the immediate period before they can use them  
13 to offset some other gains. And we were able to sell them.

14 Now, importantly, AFI is the taxpayer because the  
15 debtors were a disregarded entity. And so the tax liability  
16 for the NERDS rests with AFI, and AFI has been honoring those  
17 tax liabilities.

18 Under the tax code, as I understand it, until there is  
19 what's known as an effective transfer, the IRS views the  
20 taxpayer of record as continuing to be the taxpayer of record.  
21 So it's important for the Court to understand that by filing  
22 this motion we're not seeking to implicate or otherwise affect  
23 the tax obligations of AFI or any entity with respect to these  
24 assets.

25 THE COURT: So AFI will continue to probably have to



1 pay some tax liability and then at some point you recapture  
2 that.

3 MR. MARINUZZI: The IRS will look to AFI to pay for  
4 these tax obligations. Whether AFI in the future will be able  
5 to offset this with gains, overseas gains, I can't speak to  
6 that, your Honor.

7 THE COURT: Okay.

8 MR. MARINUZZI: Now, they're a burdensome liability to  
9 the debtors, this category of assets, Your Honor. We've  
10 anticipated abandoning them for quite some time.

11 Second category of assets are the trust certificates,  
12 and those are identified in Exhibit 2-B to the motion. And  
13 these are certificates held by RFC Asset Holdings II LLC and  
14 GMAC Mortgage in sixteen nonREMIC securitizations. Each of  
15 these trusts is a disregarded entity for tax purposes. And  
16 because AFI chose to treat the debtors as disregarded entities,  
17 this also falls on AFI's shoulders as far as tax burdens are  
18 concerned.

19 And an analysis of the underlying mortgages that make  
20 up the securitization pool shows that there's not value here to  
21 be transferred to the liquidating trust. And so we carefully  
22 evaluated this bucket of assets to see if there might be some  
23 value that was worth trying to take into the liquidating trust,  
24 and concluded that there just wasn't any, or to the extent  
25 there was, it wasn't worth any associated risks.

1           So we'd ask the Court to permit the debtors to abandon  
2   that category of assets as well.

3           The third, Your Honor, is the equity interest in a  
4   securitization that is a passive foreign investment conduit or  
5   PFIC, I guess is the way you'd say it. And it is established  
6   for federal income tax purposes. Again, as I've already said,  
7   AFI is the taxpayer of record for this particular asset.

8           And similar to the NERDS and the trust certificates,  
9   the cash flows expected from this PFIC equity are less than the  
10   taxes that could be incurred by the LT to the extent we were to  
11   transfer it to the liquidating trust. And while RFC and GMAC  
12   own this equity, it really remains an AFI tax liability. And  
13   so we would ask Your Honor, since we don't really see a benefit  
14   to continuing ownership or transferring them to the trust, that  
15   they be abandoned.

16           THE COURT: So with respect to the NERDS, the trust  
17   certificates, and the PFIC equity, AFI will continue to bear  
18   any burden or benefit associated with these categories of  
19   assets.

20           MR. MARINUZZI: Right. That's my understanding based  
21   on the discussions with the tax partners involved in the case,  
22   Your Honor.

23           THE COURT: Okay.

24           MR. MARINUZZI: They were served with a copy of the  
25   motion, and they haven't responded.

1 Your Honor, the fourth category of assets is the  
2 common lands. And these are --

3 THE COURT: This is the one that I had a question  
4 about.

5 MR. MARINUZZI: Sure.

6 THE COURT: Go ahead and explain it.

7 MR. MARINUZZI: So there are five parcels. And this  
8 is land that we can't develop, we can't sell. It's land within  
9 a development, it might be part of a park, it might be  
10 retention pond. It might be what I'll call -- I guess they use  
11 nice words to describe a dump, or they might put waste that's  
12 generated. And so within the --

13 THE COURT: That's probably the one category you  
14 shouldn't describe. No, I'm quite serious about it, because I  
15 think it's the Midlantic case that if there's potential  
16 environmental liability, courts are not supposed to let you  
17 abandon them.

18 MR. MARINUZZI: Well, Your Honor, on that note, the  
19 DOJ reached out to us. And the DOJ -- we provided them with  
20 the information regarding these parcels, they conducted their  
21 own internal investigation, and concluded not to oppose the  
22 abandonment.

23 THE COURT: Okay. So what happens -- this is the  
24 one -- with respect to the first three categories, I understood  
25 from the pleadings that AFI would continue to bear any burden

1 or any benefit resulting from the debtors' abandonment. It  
2 wasn't so clear to me what -- common land, I mean, there's  
3 land. I gather that these developments didn't want to take it.

4 MR. MARINUZZI: They did not want to take it.

5 THE COURT: So what happens to the land?

6 MR. MARINUZZI: Well, Your Honor, that's a very good  
7 question. And it begs the question when you look at the cases  
8 in the context of a Chapter 11 case on abandonment what happens  
9 with property once it's abandoned by the debtors' estates. And  
10 I've never been able to get for myself a satisfactory answer.  
11 And the last time this issue was approach in a case I was  
12 involved in, it was the Pacific Energy case down in Delaware in  
13 front of Judge Carey, Judge Carey wouldn't take the bait as to  
14 what happened afterwards. His analysis was I make a  
15 determination that it's burdensome for the estate, I'm  
16 authorizing the abandonment, what happens afterwards is not my  
17 business. I just don't have an answer for Your Honor.

18 I think the practical reality is the lawn will be  
19 mowed, no one's going to skip a particular part.

20 THE COURT: Who's going to mow it?

21 MR. MARINUZZI: The homeowner's association that's  
22 going to handle the rest of the land that shares common  
23 interest.

24 THE COURT: Who's going to insure it, who's going to  
25 bear any personal liability for a slip and fall when somebody

1 falls into the pond, or --

2 MR. MARINUZZI: Your Honor, and that's part of the  
3 analysis as to why it would be abandoned, because to accept the  
4 risk for a piece of property in this case that just poses risk,  
5 but no benefit, I mean, that's why you have 554 and are  
6 permitted to abandon it. I recognize Your Honor's distinction  
7 regarding Midlantic --

8 THE COURT: But usually you abandon property to a  
9 party who would have a possessory interest.

10 MR. MARINUZZI: Or the last interest prior to the  
11 transfer. And so presumably somebody owned this land before  
12 the debtors took title to it, how long ago I don't know. But  
13 there's a line of cases that say you look at the party that had  
14 ownership immediately prior to the debtors' taking ownership of  
15 it. So -- there must have been an owner, I don't know who that  
16 owner is, I can't identify that owner for the Court. But  
17 according to those lines of cases -- to that line of cases,  
18 that owner would now take title to the property.

19 THE COURT: So who did you give notice to with  
20 respect -- this is the only category that I had a problem  
21 about, because there's potential liability associated with  
22 land. Ordinarily one doesn't think of land just not belonging  
23 to anyone.

24 MR. MARINUZZI: Your Honor --

25 THE COURT: When you say that the homeowners will

1 continue to mow the grass, and maybe they will and maybe they  
2 won't, the real issue is potential liabilities; if someone was  
3 injured, or things of that nature.

4 MR. MARINUZZI: I don't have an answer for Your Honor.  
5 I think --

6 THE COURT: So who did you give notice to?

7 MR. MARINUZZI: We gave notice to everybody on the  
8 service list. And I believe we also gave notice to the  
9 homeowner's associations and the developers of the property.

10 THE COURT: So when you say the developers of the  
11 property, did you make an inquiry to find out who the last  
12 owner was before the debtors acquired the property?

13 MR. MARINUZZI: Your Honor, I did not, and I'm looking  
14 at Mr. Tyson sitting in the front row.

15 MR. TYSON: I think we just noticed the homeowners  
16 association.

17 MR. MARINUZZI: Just the homeowner's association. We  
18 did not make that inquiry. If Your Honor would like us to seek  
19 to identify the prior owner we could carry this aspect of the  
20 relief to make the Court more comfortable.

21 THE COURT: I'm not trying to be difficult about it,  
22 but this -- just when I tried to conceive of what was being  
23 proposed here, this was the one -- the land just sits there,  
24 not owned by anybody. That might all well and good, other than  
25 potential liability. You got a development, you know, if there

1 was a holding pond, or something, and -- these are common  
2 areas.

3 MR. MARINUZZI: Right.

4 THE COURT: And what happens if a kid gets killed?

5 MR. MARINUZZI: Your Honor, hopefully that never  
6 happens.

7 THE COURT: I hope so too. I hope it never happens as  
8 well.

9 MR. MARINUZZI: But I think we could think of a lot of  
10 things that might happen. At the end of the day there is no  
11 definitive answer about who takes --

12 THE COURT: See with respect to everything else that  
13 you're trying to abandon, analytically I understand what  
14 happens to it. The HELOCs, there's no liability associated  
15 because they're undrawn, you've already given notice that  
16 nobody could draw any additional money. If there is any money,  
17 other people are getting the benefit, you're abandoning the  
18 claim, they're never going to owe anything. Okay.

19 MR. MARINUZZI: We're eliminating the mortgages.

20 THE COURT: And with respect to the first three  
21 categories I understood that as well. It's the common land  
22 that's giving me pause.

23 MR. MARINUZZI: Right. And, Your Honor, in the  
24 Pacific Energy case, which is the last case that I worked on  
25 where this issue arose, I represented the State of Alaska. And

1 the debtor filed in Delaware. It was a lessee of oil and gas  
2 leases in Alaska. And so they filed a motion to abandon their  
3 interest in the oil and gas leases. And in that case you had  
4 the State of Alaska, which obviously owned the land, and you  
5 had Chevron, and you had -- I forget which other oil company  
6 was involved in it, in the chain of title. And so there there  
7 was a particular focus on the ownership because of potential  
8 environmental liability because of agreements among parties to  
9 the oil and gas leases as to how to apportion liability. And  
10 even with those particular facts, where parties were very  
11 interested in trying to understand under law in a Chapter 11  
12 case, who now bears that responsibility, there simply wasn't an  
13 answer. And so --

14 THE COURT: No, but there's an answer about if you're  
15 abandoning a lease the fee owner winds up owning it not subject  
16 to the lease, I suppose.

17 MR. MARINUZZI: Well, it depends, because the fee  
18 owner, looking at the case law that says the prior occupier of  
19 the property, the prior lessee now takes ownership of the  
20 lease. If you were seeking to impose liability on that party  
21 based on this handful of Chapter 11 cases you would have a  
22 different ownership -- a different argument about who owns it.

23 THE COURT: Did you give notice to the last prior  
24 lessees?

25 MR. MARINUZZI: Your Honor, we did not. Oh, in that



1 case?

2 THE COURT: Yes.

3 MR. MARINUZZI: Yes, absolutely.

4 THE COURT: Okay.

5 MR. MARINUZZI: Yes.

6 THE COURT: But so if it's -- if you abandon property  
7 and it vests back in the last prior owner, and you gave notice  
8 to them, they at least were told your client's going to abandon  
9 the property, this is a potential consequence, speak now or  
10 ever hold your peace. That's what's giving me pause here is, I  
11 don't -- that's not happening here with respect to the common  
12 land.

13 MR. MARINUZZI: So, Your Honor, we can notice -- we  
14 can try to identify the prior owners of the land. I'm assuming  
15 somewhere there's some document that evidences who owns it.  
16 I'm not sure how far back we're going, but we can make those  
17 efforts.

18 In the Pacific Energy case there was pointing fingers  
19 about who actually owns it. And the reason the prior land  
20 owner or owner of the lease was present in court, was because  
21 they were still active in the case. Right. And so their  
22 interest was to make sure that nothing touched them, they  
23 wanted to be out of it.

24 THE COURT: I apologize, Mr. Marinuzzi, did you  
25 address this specific issue --

1 MR. MARINUZZI: I did not address the specific issue  
2 in the papers, no.

3 THE COURT: That's what I -- I didn't -- I didn't see  
4 it and that's --

5 MR. MARINUZZI: Right. We did not and we -- we had a  
6 lot of discussions with Kramer Levin, and the question was what  
7 happens to these properties. And the answer is really good  
8 question, but the case law doesn't tell us what happens to it.  
9 So if the Court looks at it from the perspective of there's  
10 just no benefit to the estate, the liquidating trust doesn't  
11 want it, it's an excluded asset, there's somebody who will take  
12 care of it, it's part of common land. That was the approach we  
13 had, because we just didn't have an answer under law, Your  
14 Honor, we just didn't.

15 But to the extent the Court is uncomfortable granting  
16 the relief without having given notice to the prior owners  
17 we'll do that. We'll seek to identify them and send them a  
18 copy of the motion, and we can carry this aspect of the relief  
19 to a later hearing.

20 THE COURT: Okay. Do you want to just address the --  
21 the HELOCs I think I understand that, pretty clear on it.

22 MR. MARINUZZI: Your Honor's comments tell me that  
23 Your Honor does understand it very well. And the only aspect  
24 of it that I don't think Your Honor raised in your comments, is  
25 that we're actually undertaking the cost to release the

1 mortgages represented by these HELOCs. So instead of a  
2 borrower having to worry if they want to actually go through  
3 and get another HELOC from someone to clear title, we'll take  
4 care of that, the liquidating -- the debtors will fund it.

5 THE COURT: All right. Anybody wish to be heard with  
6 respect to the debtors' motion to authorize abandonment of  
7 interests in certain estate assets?

8 All right. I'm going to grant the motion as to  
9 everything other than the common land. And as to that I'll  
10 carry the motion. And I do want you to address specifically  
11 for me what happens to the land.

12 MR. MARINUZZI: We'll do that, Your Honor.

13 THE COURT: Someone has to own it. And if you  
14 identify -- if you have good authority that it would revert to  
15 the last prior owner, try and identify who that is, give them  
16 notice and it put it back on for hearing.

17 MR. MARINUZZI: We'll do that, your Honor.

18 THE COURT: Okay.

19 MR. MARINUZZI: Thank you very much, Your Honor.

20 THE COURT: All right. Thank you very much.

21 MR. MARINUZZI: The next item on the agenda is at the  
22 bottom of page 2, it's the claims objections number 1. And I  
23 will cede the podium to my colleague Melissa Hager.

24 THE COURT: Thank you very much.

25 MR. MARINUZZI: Thank you.

1 MS. HAGER: Good afternoon, Your Honor. Melissa Hager  
2 from Morrison & Foerster. And I'm appearing today on behalf of  
3 the ResCap borrowers' trust.

4 Your Honor, the next item on the agenda was originally  
5 the debtors' application, it's now the ResCap borrowers' trust  
6 objection, to proof of claim number 5420 filed by Vachagan and  
7 Suzie Abed-Stephen.

8 This matter was opposed by the claimants, and the  
9 borrowers' trust did submit a reply in support of the  
10 objection.

11 With me in court today is Ms. Delehey who filed two  
12 declarations in support of the objection, and she currently  
13 serves as the chief litigation counsel for the ResCap  
14 liquidating trust, and is available for any questions.

15 There's two other declarants that are also in court  
16 today that submitted declarations on the filing of the claim  
17 process protocol, if the Court has any questions about that as  
18 well.

19 Getting to the merits of the proofs of claim, Your  
20 Honor, it was one single proof of claim filed by the claimants  
21 against Residential Capital and GMAC Mortgage LLC in the amount  
22 of 1.75 million, of which 1.2 million, is on the face of the  
23 claim alleged to be a secured claim, and it listed the real  
24 property that's subject to a loan and deed of trust as a  
25 security for that.

1           The proof of claim, it was a one-pager, has no  
2 supporting documentation. Really, it was very difficult to  
3 decipher what the basis of it was. In accordance with Your  
4 Honor's protocol that was approved as part of the Chapter 11  
5 cases, we sent out the notice to them. We got a response back  
6 to them and they did file the reply. And when you cobble those  
7 together you come up with three possible causes of action upon  
8 which the claim is possibly based. And those are slander of  
9 title, breach of contract with respect to a loan modification,  
10 and cancellation of an instrument.

11           Also, if you look at their reply -- or, I'm sorry,  
12 their response to the objection it also appears that they  
13 have -- are arguing that they are entitled to the return of the  
14 monies paid to GMAC as a result of an improper filing of an  
15 assignment of a deed of trust and alleged defects associated  
16 with the securitization of the note.

17           Your Honor, as set forth in the objection and the  
18 reply, none of these claims have any merit based upon the facts  
19 and the state of the law in California, which is very clear on  
20 all of these issues.

21           And the cancellation of an instrument argument relates  
22 to a pre-petition lawsuit that the claimants brought against  
23 the debtors, pre-petition. It was dismissed without leave to  
24 plead. And there was an appeal filed, actually, post-petition,  
25 after the ResCap debtors filed for bankruptcy.

1 THE COURT: And res judicata doesn't apply because the  
2 California rule requires it be final with no appeals pending.

3 MS. HAGER: Correct, Your Honor. And that's why it's  
4 not addressed in our papers.

5 THE COURT: Right.

6 MS. HAGER: But I think here when you look at the  
7 actual claims, when you look at the body of California case law  
8 that goes back to 1908 on these issues, I think it's very clear  
9 that they do not have a claim, and they have not -- and they  
10 also state in their reply that -- response to the protocol that  
11 they incurred some legal fees and research fees, but they've  
12 never provided, despite numerous requests, any documentation to  
13 it.

14 So, Your Honor, just briefly I'm going to go through  
15 the causes of action. I'm not sure if any of the claimants are  
16 on the phone today, they didn't seem to sign up for live, but  
17 I'm not sure.

18 THE COURT: Is anybody from Abed-Stephen on the phone?  
19 All right, go ahead.

20 MS. HAGER: Okay. The first possible cause of action  
21 is slander of title. And that would arise from the allegations  
22 that the notice of default and the wrongful assignment of the  
23 deed of trust, those are the basis for those claims, asserted  
24 by the claimant.

25 THE COURT: When did GMAC record the deed? I know

1 First Federal assigned the deed to GMAC in 2006, in May 2006.

2 When did GMAC record the deed?

3 MS. HAGER: The assignment of the deed of trust was  
4 recorded on October 30th, 2008.

5 THE COURT: Okay.

6 MS. HAGER: It was assigned on May 22nd, 2006. And it  
7 was recorded on October 30th, 2008.

8 THE COURT: Is there some reason there was a two-year  
9 gap before it was recorded?

10 MS. HAGER: Yes, Your Honor. Although, if you look at  
11 the California case law, and the case law that we cited,  
12 there's actually no requirement that it be recorded prior to  
13 the commencement of foreclosure on the property, particularly  
14 because there's a big difference between a deed of trust and a  
15 mortgage that I know Your Honor is well aware of, and I don't  
16 need to probably go into that difference, unless, of course,  
17 you want me to.

18 THE COURT: No. I just -- I saw -- I couldn't tell  
19 whether it was a typo, because I saw it looked like May 2006  
20 GMAC gets the assignment, and I saw the October 30th, 2008 date  
21 as the day it was recorded, and I wasn't quite sure why that  
22 long time gap.

23 MS. HAGER: I just know the dates, I don't have any  
24 further background for that, Your Honor.

25 THE COURT: All right. All right, go ahead.

1 MS. HAGER: With regard to a slander of title claim,  
2 there's four elements: a publication, which is without  
3 privilege or justification, which is false, and which causes a  
4 direct and immediate pecuniary loss.

5 With regard to the claimant's allegation of the  
6 wrongful recording of the notice of default, it fails to  
7 satisfy that test for at least two of the elements.

8 First, the notice of default was not a false  
9 publication. The claimants had defaulted on their loan, and  
10 actually have remained in default since 2008. At no time have  
11 they submitted any proof otherwise. Also, under California law  
12 there is a -- for nonjudicial foreclosure, which is what we  
13 were talking about here -- and one other fact to just point out  
14 to the Court, too, is that ultimately the notice of default in  
15 the trustee sale were rescinded, so that they're still in  
16 possession of the property, so it's even harder to prove a --

17 THE COURT: The reason it was rescinded is what?

18 MS. HAGER: It was really a timing issue, Your Honor.  
19 We looked into that and tried to get as much information as we  
20 could. And they felt the information was a little bit stale,  
21 it was over a year and they didn't feel comfortable going  
22 forward with that, so they rescinded it. And this loan was  
23 part of the transfer of the plat -- of the platform over to --  
24 as part of the bankruptcy sale. So I'm not sure what would  
25 happen.



1 THE COURT: So it's in Ocwen's court to decide what to  
2 do.

3 MS. HAGER: Thankfully, yes, Your Honor.

4 So there is a privilege -- there's a privilege under  
5 California law for the filing of a notice of default, unless  
6 you can prove a willful or a malicious filing of that. Again,  
7 none of the facts have been alleged here for that.

8 Slander of title claim is also asserted with regard to  
9 the assignment of the deed of trust to GMAC. And, again, that  
10 fails to satisfy the elements for a slander of title claim,  
11 because it was not a false publication, there's been no  
12 allegation that it was, and, also, there's been no allegation  
13 of any direct and proximate damages as a result of that.

14 With regard to the loan -- the second potential cause  
15 of action, which is the loan modification, there are numerous  
16 elements that are not even alleged, let alone supported, which  
17 would be necessary in order to provide for a claim of a breach  
18 of contract with regard to a loan modification.

19 And the first one is the one that's the most  
20 problematic (sic), is it's the existence of a contract. Here,  
21 there's been no allegation, no proof, that there was an actual  
22 contract to modify the original loan. There's been no written  
23 documentation, the deed of trust actually provides that if  
24 there's a modification among the borrower and the lender it has  
25 to be in writing, and there's been nothing here.

1 The other elements are the plaintiff's performance, or  
2 excuse for nonperformance, defendant in this case would be the  
3 debtors' breach of the contract and resulting damages.

4 Here, as is set forth in the papers, and particularly  
5 in the declaration, there was some discussions back in 2009  
6 about doing a forbearance type of agreement and maybe getting  
7 to a loan modification. However, there was never a contract  
8 agreeing to modify the loan, and also the claimants failed to  
9 make the last payment.

10 THE COURT: So did the debtors search their books and  
11 records to determine whether there were any documents received  
12 from the borrowers seeking a loan modification?

13 MS. HAGER: When you say any documents received from  
14 the borrowers --

15 THE COURT: Was there a -- did the debtors make an  
16 offer of a loan modification?

17 MS. HAGER: No. There was an offer made with regard  
18 to a forbearance. There were certain forbearance plans in  
19 2009. And under those plans they were to make monthly payments  
20 of approximately 3,000 dollars per month for a period of time.  
21 They made -- they did make over 18,000 dollars in payments  
22 under that forbearance plan, but they did not make a payment --  
23 a payment that was due in October -- I'll just get the date for  
24 you -- October 26th of 2009, they failed to make that payment.

25 As part of this process the debtors were advising the

1 claimants that they'd be making these 3,000-dollar monthly  
2 payments in order to forebear on the foreclosing of the  
3 property, with ultimately hopefully obtaining a loan  
4 modification. There was no promise, there was no doc -- there  
5 was certainly documents exchanged, there was payments  
6 exchanged. There's also the debtor sent them a workout package  
7 to the debtors.

8 THE COURT: Were any countersigned by the borrowers?

9 MS. HAGER: I am not aware of any. As is part of  
10 the -- as part of the process of this, we went through the  
11 files and we put forth all the facts in the declaration of  
12 which we're aware of. And I don't think that there was ever  
13 anything as well, because back in February of 2009, the  
14 claimants did submit a workout package to the debtors seeking a  
15 loan modification; that's what started this whole process. But  
16 for a four- or five-month period between June of 2009 and  
17 October of 2009, that's when they made the payments, and --  
18 under the forbearance plan. And the debtors also contacted  
19 them on seven different occasions saying that they needed more  
20 information in order to proceed with the loan modification  
21 package because the information was stale. So --

22 THE COURT: Okay. All right.

23 MS. HAGER: -- based upon that information, to my  
24 knowledge, there was never a loan modification --

25 THE COURT: Okay.

1 MS. HAGER: -- agreed to, signed, sealed and delivered.

2 THE COURT: All right. I think I understand your  
3 arguments.

4 Is anyone appearing on behalf of the claimants? This  
5 relates to the objection to claim number 5420?

6 All right, I'm going to take it under submission.

7 MS. HAGER: Thank you, Your Honor.

8 THE COURT: Okay, thank you.

9 MS. HAGER: The next item on the agenda is going to be  
10 handled by my colleague, Jordan Wishnew.

11 THE COURT: Okay.

12 MR. WISHNEW: Good afternoon, Your Honor. Jordan  
13 Wishnew, Morrison & Foerster, appearing for the ResCap  
14 liquidating trust.

15 Your Honor, this is two matters left in today's  
16 calendar. The first is the item 2 on page 3, twenty-sixth  
17 omnibus objection. That matter has been adjourned till March  
18 11th consistent with Ms. Mitchell's request, I think, last  
19 week.

20 So that brings us to the final matter on today's  
21 calendar, the forty-second omnibus objection with regards to  
22 the claims, claims 338 and 339 of Mr. and Mrs. Schermerhorn.

23 THE COURT: Mr. Fiveson's appearing on behalf of the  
24 claimants?

25 MR. FIVESON: Yeah, I'm just local counsel, Your

1 Honor. We have somebody on the phone.

2 THE COURT: Okay.

3 MR. FIVESON: Mr. MacKinnon?

4 MR. MACKINNON: Michael MacKinnon, Pyle, Sims, Duncan  
5 & Stevenson on behalf of Jason and Jennifer Schermerhorn.

6 THE COURT: All right. I just note for the record,  
7 I've known Mr. Fiveson for a very long time.

8 MR. FIVESON: We were members of the same synagogue --

9 THE COURT: Same synagogue.

10 MR. FIVESON: -- but I don't think that'll -- okay.

11 THE COURT: I always disclose it when it comes up, but  
12 go ahead.

13 MR. WISHNEW: Thank you, Your Honor.

14 So, Your Honor, this is on two claims filed by Mr. and  
15 Mrs. Schermerhorn, numbers 338 and 339 on the debtors' claims  
16 register against GMAC Mortgage and ETS. These claims arise out  
17 of pre-petition litigation between the debtors and Mr. and Mrs.  
18 Schermerhorn and their title insurers concerning, really, a  
19 title issue. As is really exhaustively detailed in both the  
20 response of the Schermerhorn as well as the debtors' reply and  
21 supporting declara -- and the debtors' reply --

22 THE COURT: The debtors lost but the issue is about  
23 attorneys' fees.

24 MR. WISHNEW: That's exactly right, Your Honor. It's  
25 basically, there was a judgment against us. We acknowledged

1 that. There were two statements of decisions that preceded  
2 that judgment. The court said debtors, nice try, but you're  
3 wrong. And basically they said the issue of attorneys' fees  
4 and costs, we'll take up at another time.

5 So the Schermerhorns took up their costs very  
6 promptly, and after some back-and-forth of the parties, there  
7 was an acknowledged claim of \$14,463.51. And that is the basis  
8 for the debtors' wanting to reduce and allow what is a \$580,000  
9 filed claim to \$14,463.51, because that memorandum of costs  
10 that was approved by the parties and received by the court in,  
11 I believe, February of 2012, at least three months before the  
12 bankruptcy filing, is something that's reflected in our books  
13 and records.

14 The issue, as Your Honor will see in the judgment  
15 that's attached to the response, the judgment does not take up  
16 nor does it make any sort of finding of automatic entitlement  
17 to attorneys' fees. Rather, the Schermerhorns were required  
18 under the California Rules of Courts and California Civil  
19 Procedure to submit a motion for attorneys' fees within sixty  
20 days of the judgment being entered which is the same time  
21 period that they're required to appeal the judgment.

22 They didn't appeal the judgment; they didn't file the  
23 motion for attorneys' fees. They never sought leave to extend  
24 the time to file; they never got a stipulation from the debtors  
25 extending their time to file. So --

1 THE COURT: So this basically comes down to, if I  
2 understand it correctly, that judgment was entered. Your  
3 position is that they had sixty days from the entry of judgment  
4 to seek to recover attorneys' fees. They didn't do it within  
5 that time period, and therefore the debtors argue they're  
6 precluded from advancing their claim for the attorneys' fees.  
7 Here it's 568,000 of attorneys' fees, so it's a considerable  
8 sum of money.

9 MR. WISHNEW: That's exactly right. I think that's  
10 absolutely our first argument. If Your Honor questions that  
11 argument, I think we have a second --

12 THE COURT: How many days after the judgment did they  
13 first seek attorneys' fees?

14 MR. WISHNEW: Well, that's the thing, Your Honor.  
15 They really never did file to seek attorneys' fees. They  
16 submitted in a status report attached to their papers -- they  
17 say oh, we're going to be filing this -- and this is May 25th.  
18 But they've never actually filed the motion and put it on  
19 notice.

20 THE COURT: So is the first time when they filed the  
21 proof of claim here?

22 MR. WISHNEW: That's my argument, Your Honor, yes.  
23 Absolutely.

24 THE COURT: And how long after the entry of judgment  
25 did they file a proof of claim seeking to recover attorneys'

1 fees?

2 MR. WISHNEW: I believe their -- give me -- roughly,  
3 Your Honor, if the judgment was in January and the proof of  
4 claim, let's call it October or November. Eight, nine, ten  
5 months, Your Honor.

6 THE COURT: Okay.

7 MR. WISHNEW: Just give me one minute. I just want to  
8 double-check the date of their proof of claim.

9 Okay. Let me just correct the record, Your Honor.

10 THE COURT: Sure.

11 MR. WISHNEW: The proof of claim was filed July 26th,  
12 but still, Your Honor, we're talking six months after the  
13 judgment.

14 THE COURT: Okay.

15 MR. WISHNEW: Well, more than six months after the  
16 judgment. So --

17 THE COURT: And the bankruptcy was filed in May?

18 MR. WISHNEW: May 14th, Your Honor.

19 THE COURT: May 14th.

20 MR. WISHNEW: Yes.

21 So with regards -- so that's really the first  
22 argument. We think --

23 THE COURT: So how many days after the judgment was  
24 entered was the bankruptcy petition filed?

25 MR. WISHNEW: Let's -- roughly four months, Your



1 Honor. Roughly four months.

2 THE COURT: Okay.

3 MR. WISHNEW: So that's argument number one. If Your  
4 Honor doesn't want to take that argument, then we have the  
5 second argument which is Section 1717 of the California Civil  
6 Code which talks about the reciprocal rights to get attorneys'  
7 fees when --

8 THE COURT: The prevailing party rule.

9 MR. WISHNEW: It is the prevailing party rule, Your  
10 Honor. But there's two fatal flaws with the 1717 argument in  
11 this context. One is that the document that the Schermerhorns  
12 reference as being the applicable document entitling them to  
13 attorneys' fees is the deed of trust. The deed of trust, if  
14 you look at the face of the complaint also attached to the  
15 Schermerhorns' response, doesn't speak of any sort of  
16 enforcement of the deed of trust; it seeks to interpret a --  
17 notes of substitution and a full reconveyance. It does not  
18 seek to enforce in any way the deed of trust, because the  
19 Schermerhorns weren't a party to the deed of trust with the  
20 debtors. It was the Toziers --

21 THE COURT: The underlying dispute is because the  
22 debtors erroneously released their first lien --

23 MR. WISHNEW: Absolutely correct, Your Honor. That's  
24 exactly right.

25 So what the debtors were trying to do through their

1 action pre-petition was to simply have the court interpret in  
2 their favor documents that while they acted improperly and that  
3 the first lien against the real property, which the debtors  
4 didn't even service at that time, could essentially get put  
5 back in place. The debtors didn't succeed on that. So  
6 basically, as Your Honor understands, there was no action on  
7 the contract, the deed of trust, and there was also no  
8 enforcement of the deed of trust. And so you don't have the  
9 requisite elements under Section 1717 of the California Civil  
10 Code to entitle them to this reciprocity that's contemplated by  
11 a prevailing party, especially when, again, looking at the face  
12 of the pleadings, the debtors didn't seek to enforce any sort  
13 of damages or get recovery of any monetary damages from the  
14 Schermerhorns.

15 So I'll certainly applaud them for their creativity,  
16 but it's -- it fails on its face, Your Honor, and for that  
17 reason we would ask that the objection be sustained.

18 THE COURT: Okay. Let me hear from their counsel.  
19 Mr. Fiveson, are you going to argue or Mr. --

20 MR. FIVESON: Mr. MacKinnon? I think Mr. MacKinnon  
21 wants to take the --

22 THE COURT: All right. Mr. MacKinnon, why don't you  
23 go ahead?

24 MR. MACKINNON: Thank you, Your Honor. Michael  
25 MacKinnon on behalf of the Schermerhorns.

1           Your Honor, obviously this was a long and painful case  
2 for all of us involved. One of the issues was the expungement  
3 of the lis pendens that the plaintiffs had filed in the case or  
4 a withdrawal, a voluntary withdrawal, of the lis pendens. In  
5 one of the post-judgment -- pre-entry of the judgment but post-  
6 trial hearings on September the 16th, 2011, Judge Ziebarth  
7 ordered that all remaining issues be dealt with at the same  
8 time, and that was including the attorneys' fees and the costs  
9 as well as the issue of the lis pendens.

10           And at that time, it had been the pronounced  
11 expectation from the debtors' counsel, Mr. Ensberg, that they  
12 would be filing an appeal. The judgment itself is leaving the  
13 determination for adjudication subsequently. And the  
14 subsequent adjudication, in our understanding, was that it  
15 would be heard in conjunction with the expungement motion or  
16 the withdrawal of the lis pendens.

17           Obviously when the appeal period ran without there  
18 being an appeal filed, then we were in a position to compel the  
19 expungement or to request a withdrawal of the proof of claim --  
20 excuse me -- of the lis pendens. And in fact, the debtor did  
21 file a withdrawal of the lis pendens in June of 2012. So  
22 our -- post-petition. Our feeling, understanding, all along is  
23 that the two matters would be heard simultaneously so that,  
24 obviously, attorneys' fees involved in any motion to expunge  
25 the lis pendens would be part of the same hearing and not

1 require a separate second hearing on the same issue.

2 That, in a nutshell, is where we are on the timing  
3 fact. It goes back all the way to --

4 THE COURT: But you did --

5 MR. MACKINNON: -- September the 16th of 2011. And --

6 THE COURT: You did go forward -- hold it, just stop a  
7 second.

8 You did go forward and submit a bill of costs, and  
9 that was resolved by the court. I mean, the parties agreed  
10 on -- was that by agreement or did the court have to resolve  
11 disputes with respect to the bill of costs?

12 MR. MACKINNON: We resolved our dispute consensually  
13 with the plaintiffs. There were others who did it differently.  
14 The bills of cost, however, are things which are set at the  
15 time of trial, whereas the attorneys' fees were still open-  
16 ended at that point.

17 THE COURT: But the bill of costs was resolved within  
18 the time specified by the California statute, correct?

19 MR. MACKINNON: Yes, it was. For us; it was not for  
20 all the parties.

21 THE COURT: All right. Go ahead. Go ahead with your  
22 argument.

23 MR. MACKINNON: Okay. And, Your Honor, turning to  
24 Civil Code -- California Civil Code Section 1717, what we're  
25 looking for here is, frankly, the -- the plaintiff asked on his

1 third cause of action for a determination and -- I'm quoting  
2 now -- "that the one digit misnumbering is corrected so as to  
3 ensure that all subsequent encumbrances on the subject real  
4 property are properly subject to the first position deed of  
5 trust as evidenced by Exhibit 1 and incorporated here and by  
6 this reference," which is the deed of trust itself.

7 In other words, the deed of -- what the plaintiffs  
8 were seeking against my clients was a determination that the  
9 deed of trust, including the ability to have attorneys' fees  
10 and costs added as a lien against the property, be enforced and  
11 reinstated in full.

12 THE COURT: But the judgment that was entered was a  
13 judgment on the entire matter. The debtor lost on the issue of  
14 trying to avoid its lien release, and a single judgment was  
15 entered. Did the judgment say that it was a judgment in part  
16 and that issues remain to be resolved?

17 MR. MACKINNON: Well --

18 THE COURT: I mean, it looked to me to be a judgment  
19 resolving the litigation. It wasn't a partial judgment. Can  
20 you answer that, Mr. MacKinnon?

21 MR. FIVESON: Yeah, excuse me, if I may. Your Honor,  
22 the judgment which was proffered by counsel --

23 THE COURT: You know, Mr. Fiveson, what I -- I let one  
24 lawyer argue --

25 MR. FIVESON: Sorry.

1 THE COURT: -- on a matter, okay?

2 MR. FIVESON: Excuse me, Your Honor.

3 THE COURT: If he can't, I'll give you a chance, but

4 I --

5 MR. FIVESON: Okay, I'm sorry, sir.

6 THE COURT: -- don't want to interrupt Mr. MacKinnon's  
7 argument.

8 MR. MACKINNON: Okay, thank you, Your Honor.

9 The unresolved matters in the issuance on January  
10 10th, 2012 of the judgment were the manner of getting a viable  
11 expungement or release of the lis pendens and the attorneys'  
12 fees. And the judge had ordered that those be resolved either  
13 consensually or by a separate motion, but that they be  
14 determined together. The time given the --

15 THE COURT: Where does it say that?

16 MR. MACKINNON: That's what he told us on --

17 THE COURT: Well, I hear what you just told me, but  
18 that's not what the judgment says. So point me to a document  
19 that says what you've just told me that the issue of  
20 expungement of the lis pendens and attorneys' fees remain to be  
21 resolved.

22 MR. MACKINNON: For that, Your Honor, I would have to  
23 get a copy of the transcript of the September 16th hearing.  
24 This was not an issue we'd expected, so we have not yet  
25 procured that.

1 THE COURT: That I don't understand. I can't -- you  
2 know what the debtors' argument is. It's been clear what the  
3 debtors' argument is; that there was a final judgment and you  
4 had sixty days thereafter to seek your attorneys' fees and you  
5 didn't do it. So your telling me that you didn't anticipate  
6 this issue I find surprising.

7 MR. MACKINNON: Well, you know --

8 THE COURT: And the fact -- whatever the judge may  
9 have said in the transcript, the judgment is the judgment.

10 MR. MACKINNON: That -- we certainly understand that,  
11 Your Honor.

12 THE COURT: Which court was this in?

13 MR. MACKINNON: The California Superior Court in San  
14 Bernardino County. Excuse me, of Riverside County, Your Honor.

15 THE COURT: Okay. Okay, anything else you want to  
16 add?

17 MR. MACKINNON: No, that's all, Your Honor.

18 THE COURT: Okay.

19 Mr. Fiveson, I'll give you a chance if you want.

20 MR. FIVESON: If I may, Your Honor. I'd like to draw  
21 the Court's attention to the reply submitted by ResCap and the  
22 judgment in question; the last page of the judgment is page 57.

23 THE COURT: Let me find it, okay? Hang on.

24 MR. FIVESON: Thank you, sir.

25 MR. WISHNEW: Your Honor, it's attached to -- as

1 Exhibit 1 to the debtors' reply is the claimants' proof of  
2 claim.

3 THE COURT: Where in this big binder will I find it?

4 MR. WISHNEW: Should be in the binder, tab 5, I think,  
5 Your Honor. Probably the last --

6 THE COURT: I don't think so.

7 MS. HAGER: I believe it's tab 12 --

8 THE COURT: Hold on. Tab 16, my law clerk tells me.  
9 All right, Mr. Fiveson, where -- I've got the reply.

10 MR. FIVESON: The last page, page 57 --

11 THE COURT: Of which?

12 MR. FIVESON: Of that document. It's the last page of  
13 the judgment.

14 THE COURT: Hold on.

15 MR. WISHNEW: It's Exhibit 1 to the debtors' reply is  
16 Mr. and Mrs. Schermerhorns' proof of claim.

17 THE COURT: Okay.

18 MR. WISHNEW: It's at the end of their proof of claim.

19 THE COURT: All right, hang on.

20 MR. FIVESON: And it says, "Issues concerning" -- this  
21 is right before the signature of the deciding judge -- "Issues  
22 concerning costs including claim for attorneys' fees shall be  
23 adjudicated via post-judgment proceedings and thereafter  
24 interlineated herein."

25 THE COURT: Yeah, post-judgment proceedings is within



1 sixty days, what the California Civil Code requires. It's a  
2 post-judgment proceeding required by 1717 to be within sixty  
3 days. So I take your point, but I'm not sure it gets you where  
4 you want to go.

5 MR. FIVESON: Well, I'm not -- it --

6 THE COURT: I mean, could they have waited a year?

7 MR. FIVESON: If -- well, what happened was is that  
8 the lis pendens at this time had not -- as I understand, had  
9 not been vacated, so there would have been counsel fees  
10 incurred in connection with removing that lis pendens. And I  
11 think what Mr. MacKinnon is saying is that it was the  
12 understanding, when I think it can be read into this order,  
13 that those proceedings of attorneys' fees would be adjudicated  
14 at some future point in time. And what happened was is that  
15 the debtor filed the Chapter 11, I believe, in May -- it was  
16 May of that year. So --

17 THE COURT: Okay, so what you're -- but, Mr. Fiveson,  
18 I'm looking at page 6 of the judgment, it's in paragraph 7, and  
19 it says, "Issues concerning costs including claims for  
20 attorneys' fees shall be adjudicated via post-judgment  
21 proceedings and thereafter interlineated herein." So there are  
22 some blanks --

23 MR. FIVESON: Right.

24 THE COURT: -- to fill in costs. There's nothing  
25 about subsequent procedures with respect to a lis pendens. It

1 specifically -- what you're pointing to specifically references  
2 issues concerning cost including claims for attorneys' fees.  
3 And then there are blanks: there's one for the Schermerhorns  
4 and one for Bank -- three -- one for Bank of America and one  
5 for Wells Fargo. And there were blanks to be filled in, and  
6 basically you got sixty days to do it after there's been a  
7 judgment. The date of the judgment is January 10th, 2012.  
8 What am I -- what's wrong about what I just said?

9 MR. FIVESON: I think the statute -- and if you have a  
10 stipulation or you have an order otherwise, and I think it can  
11 be --

12 THE COURT: Does the statute say that?

13 MR. FIVESON: I think it says by stipulation of the  
14 parties, yes.

15 Mr. MacKinnon, isn't that correct? I --

16 MR. MACKINNON: Your Honor --

17 THE COURT: Go ahead.

18 MR. MACKINNON: Michael MacKinnon. Rule 3.1702 of the  
19 California Rules of Court (d) states, "Extensions. For good  
20 cause, the trial judge may extend the time for filing a motion  
21 for attorney's fees in the absence of a stipulation or for a  
22 longer period than allowed by the stipulation."

23 THE COURT: Okay. And does that have to be done  
24 before the time runs out?

25 MR. MACKINNON: I believe so, yes.

1 THE COURT: I mean, ordinarily, you can't -- once -- a  
2 court may be able to extend time during a period when it would  
3 still be timely to file. That certainly happens in bankruptcy  
4 court.

5 MR. MACKINNON: Yes.

6 THE COURT: But once the time is expired, I can't  
7 revive it. So do you have -- I mean, is there something in  
8 that statute that says after the time has expired, the court  
9 for good cause shown can provide additional time?

10 MR. MACKINNON: No, Your Honor. There is not. But  
11 then I'm going back to the September 16th hearing when --

12 THE COURT: Let me ask you this. Just, Mr. MacKinnon,  
13 give me the rule number that you referenced.

14 MR. MACKINNON: It's 3.1702(d), D as in dog.

15 THE COURT: Okay, thank you. All right, go ahead. I  
16 interrupted you. Go ahead.

17 MR. MACKINNON: I'm sorry. That's -- but our  
18 understanding was that in the post-trial motion -- hearing on  
19 September the 16th, 2011, the judge made clear that the  
20 clearing of the title, the expungement or withdrawal of the lis  
21 pendens and the attorneys' fees were to be heard at the same  
22 time. And, in fact, we did not get the withdrawal of the lis  
23 pendens until June of 2012.

24 Now, Judge Ziebarth is a retired judge who sits by  
25 designation as needed and according to what his schedule is.

1 So he's not generally on site. In fact, he doesn't live near  
2 the courthouse in Riverside. So he wanted to make sure that  
3 everything was heard as collectively as possible.

4 THE COURT: Who appeared in the case for the debtors?

5 MR. WISHNEW: It was --

6 MR. MACKINNON: Stephen Ensberg did, Your Honor.

7 MR. WISHNEW: Stephen Ensberg.

8 THE COURT: Ensberg.

9 MR. WISHNEW: Your Honor, just to note, Mr. Ensberg --  
10 there was Exhibit 2 to the debtors' reply -- I'm sorry, Exhibit  
11 3 to the debtors' reply includes a letter from Mr. Ensberg to  
12 Mr. MacKinnon as well as his colleague Ms. Cashman-Kramer  
13 specifically addressing the fact that the request for the  
14 attorneys' fees was untimely and to which we never got a  
15 response to that.

16 THE COURT: Okay. All right --

17 MR. WISHNEW: I'd also -- just one other point for the  
18 record.

19 THE COURT: Go ahead, quickly.

20 MR. WISHNEW: Your Honor correctly points out Cha --  
21 sorry -- section 7 of the judgment, and Mr. MacKinnon is  
22 arguing well, at a hearing the judge said this and there's  
23 nothing in the record before Your Honor to support that. The  
24 lis pendens and the attorneys' fees were not treated together;  
25 in fact, the judge made a point of specifically saying at the

1 beginning of section 7, "The lis pendens filed by plaintiffs  
2 with respect to the subject property is hereby expunged."

3 THE COURT: It was dealt with.

4 MR. WISHNEW: It was dealt with, Your Honor. So our  
5 position is the lis pendens was dealt with, the attorneys' fees  
6 was to be addressed consistent with California Civil Procedure.  
7 The Schermerhorns didn't do that. This was not an action on  
8 the contract, so Your Honor can either knock it out -- I'm  
9 sorry, disallow the claim because it was untimely or disallow  
10 it as well because there is no reciprocal benefiter, under  
11 Section 1717.

12 THE COURT: Okay. I'm going to take the matter under  
13 submission.

14 MR. WISHNEW: Thank you, Your Honor.

15 MR. MACKINNON: Thank you, Your Honor.

16 THE COURT: Thank you, Mr. MacKinnon.

17 MR. WISHNEW: That is the last matter on today's  
18 calendar and unless Your Honor has any questions, I guess we'll  
19 see you Thursday morning.

20 THE COURT: Yes.

21 MR. WISHNEW: Thank you, Your Honor.

22 THE COURT: I thought we were supposed to be reducing  
23 the number of ResCap --

24 MR. WISHNEW: Honestly, we're trying, Your Honor. We  
25 are, I promise.

1 THE COURT: All right. Thank you very much. All  
2 right, we're adjourned.

3 (Whereupon these proceedings were concluded at 2:58 PM)  
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E X H I B I T S

DESCRIPTION	PAGE
Declaration of William Tyson	7

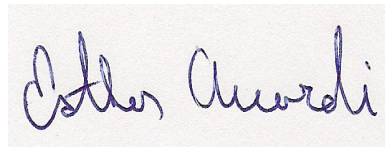
R U L I N G S

	PAGE	LINE
Debtors' Motion Pursuant Order Approving	19	7
Abandonment of Debtors' Interests		
in Certain Assets granted as to everything		
other than the common land		

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C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.

A handwritten signature in blue ink that reads "Esther Accardi". The signature is written in a cursive style and is centered within a light gray rectangular box.

---

ESTHER ACCARDI

AAERT Certified Electronic Transcriber CET\*\*D-485

eScribers

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Date: January 28, 2014